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IN THE

Supreme Court of the United States

No. [redacted] Misc.

5121

KENNETH DONALDSON,

Petitioner,

—v.—

J. B. O'CONNOR, M.D., *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF AMERICAN CIVIL LIBERTIES UNION

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—v.—

J. B. O'CONNOR, M.D., *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Motion for Leave to File Brief Amicus Curiae

The American Civil Liberties Union respectfully moves for leave to file a brief amicus curiae in this case. Petitioner's attorney has consented to the filing of the brief; respondents' attorney has refused our request for consent.

Though aware, of course, of Rule 42 (1) of the Rules of the Supreme Court of the United States, which discourages motions to file amicus curiae briefs in support of petitions for certiorari, amicus departs from its normal compliance with the spirit of that Rule because of special circumstances in this case.

The case at bar involves the constitutional rights of persons held in custody by the state in institutions for the "mentally ill" under "civil" commitment proceedings. Though this Court has addressed itself on several occasions

to constitutional issues presented by the commitment in criminal cases of defendants said to be mentally ill, it has not had occasion to assess from a constitutional point of view the civil commitment of non-criminals to institutions for the mentally ill. We believe that this case presents the Court with the opportunity to explore the urgent constitutional issues which pervade the civil commitment process.

Our reasons for believing that the Court should grant certiorari are set out in the accompanying brief. The views set forth in the brief are the product of a special program established a year ago by the New York Civil Liberties Union to protect and expand the liberties of the very large number of persons who are said by the state to be mentally ill. The project, the only one of its kind in the United States, is devoted entirely to an exploration of the theoretical and applied constitutional problems which abound in the field. The undersigned's co-counsel in the accompanying brief is the attorney engaged full time in the operation of this special project. We believe that the experience gained in the course of his work will be useful to the Court in its deliberations upon the petition for certiorari in the case at bar.

Respectfully submitted,

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Attorney for Movant

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE

Interest of Amicus

The interest of Amicus is set out in the preceding Motion for Leave to File this Brief.

Statement of the Case

In 1956, petitioner was committed to a civil mental institution, where he is still confined. He was not properly represented by counsel, even though he was (and remains) indigent. During his thirteen years of confinement petitioner has never threatened or committed any dangerous or violent act. He has never been convicted or even charged with any crime. Petitioner claims, as he has claimed for the past ten years, that he is no longer mentally ill. He claims

(a claim which is apparently not disputed) that during virtually all of his thirteen years' confinement the ratio of physicians to inmates in the petitioner's section of the institution has varied from 1 to 1000 to 1 to 950. He claims that he receives no medication and no individual or group psychotherapy. The present petition is the latest in a series of at least eighteen unsuccessful attempts by petitioner to obtain, for the first time since his commitment, judicial review of his current mental condition. In each of his previous attempts, petitioner claimed that his initial commitment was unconstitutional because he was not properly represented by counsel, and claimed also that his continued confinement was unconstitutional because he was not receiving adequate treatment. Petitioner's latest petition for a writ of habeas corpus was denied on October 5, 1968, without a hearing, and that denial was ultimately affirmed by the Supreme Court of Florida on November 19, 1969.

REASONS FOR GRANTING THE WRIT

Introduction

In the past decade this Court has shown great concern for the constitutional rights of mentally ill "criminals." E.g., *Dusky* v. *United States*, 362 U.S. 402 (1960); *Lynch* v. *Overholser*, 369 U.S. 705 (1962); *Baxstrom* v. *Herold*, 383 U.S. 107 (1966); *Pate* v. *Robinson*, 383 U.S. 375 (1966); *Specht* v. *Patterson*, 386 U.S. 605 (1967). See also, *Robinson* v. *California*, 370 U.S. 660 (1962) (narcotics addiction); and *Powell* v. *Texas*, 392 U.S. 514 (1968), *reh. den.*, 393 U.S. 898 (1969) (chronic alcoholism). For persons caught in the criminal process, those decisions have meant a great deal. There are, however, hundreds of thousands of "civil" mental patients who have not been affected at all by those decisions.[1] This brief is submitted in the belief that it is imperative for this Court to clarify the constitutional rights of "civil" mental patients.

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[1] In the United States over ten per cent of the population will at some time be hospitalized because of "mental illness." There are more than a half-million hospital beds for mental patients. That is more beds than are available for physical illness. Approximately 17 million persons are thought to be currently suffering from some degree of mental illness. In New York, more than 25,000 people are committed to state mental hospitals each year. See generally *Mental Illness & Due Process* (Association of the Bar of the City of New York), pp. v, 11 (1962); *The Myth of Mental Illness*, Szasz, p. x (1961).

I.

Civil mental patients are constitutionally entitled to procedural safeguards at least equivalent to those afforded criminal defendants.

It cannot be stressed too urgently that we are here concerned with physical liberty, the most fundamental of rights, and the right without which all others are of little value. Because liberty is as precious to the civilian as to the criminal, lower courts have subjected civil commitment procedures to rigid scrutiny. In *Denton v. Commonwealth*, 383 S.W.2d 681, 682 (Ky. 1964), for example, the Court of Appeals of Kentucky ruled that prospective mental patients are constitutionally entitled to all of the traditional criminal safeguards:

> Although lunacy inquests are not concerned with criminal intent or criminal acts they may result in depriving the defendant of his liberty and his property. This deprival should be obtained only by the due process of law under constitutional guarantees.
>
> We have therefore concluded that when a proceeding may lead to the loss of personal liberty, the defendant in that proceeding should be afforded the same constitutional protection as is given to the accused in a criminal prosecution.

Similarly, in *People ex rel. St. Saviour Sanitarium*, 34 App. Div. 363, 372, 56 N.Y.S. 431, 437 (1st Dept. 1898), the court remarked:

> An alleged criminal is hedged about with safeguards and protections. Why should not an alleged incompetent or dangerous person receive the same protec-

tion? Shall *ex parte* proof that would only avail to hold an alleged criminal for trial be regarded as conclusive proof against a supposed unfortunate? Constitutional immunities are precisely the same as to each.

This Court, too, has disregarded the civil-criminal label. *Specht* v. *Patterson*, 386 U.S. 605, 608 (1967) ruled that "commitment proceedings whether denominated civil or criminal are subject both to the Equal Protection Clause of the Fourteenth Amendment as we held in *Baxstrom* v. *Herold*, 383 U.S. 107, and to the Due Process Clause." *Specht* also cited with approval a lower court decision which granted to a person alleged to be "an habitual [sex] offender and mentally ill" the "full panoply of the relevant protections which due process guarantees in state criminal proceedings" (386 U.S. at 609).[2]

And in *In Re Gault*, 387 U.S. 1, 50 (1967), this Court expressly disregarded "the 'civil' label-of-convenience which has been attached to juvenile proceedings," and ruled that alleged delinquents were entitled to procedural protections traditionally afforded to "criminals" because "... commitment is a deprivation of liberty. It is incarceration against one's will, whether it is called 'criminal' or 'civil'" (387 U.S. at 50).[3] In *Gault*, the traditional re-

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[2] Quoting from *Gerchman* v. *Maroney*, 355 F.2d 302, 312 (3rd Cir. 1966).

[3] See also, *Harryford* v. *Parker*, 396 F.2d 393, 396 (10th Cir. 1968): "It matters not whether the proceedings be labeled 'civil' or 'criminal' or whether the subject matter be mental instability or juvenile delinquency. It is the likelihood of involuntary incarceration—whether for punishment as an adult for a crime, rehabilitation as a juvenile for delinquency, or treatment and training as a feeble-minded or mental incompetent—which commands observance of the constitutional safeguards of due process."

habilitative purpose of juvenile delinquency proceedings was considered less important, for constitutional purposes, than the consequence of those proceedings.

Read together, these cases establish the proposition that persons accused of mental illness must be afforded no fewer constitutional protections than persons accused of crime.

A. *Indigent Mental Patients Are Constitutionally Entitled to Assigned Counsel.*

The Draft Act Governing Hospitalization of the Mentally Ill provides in section 9(f) that "an opportunity to be represented by counsel shall be afforded to every proposed patient, and if neither he nor others provide counsel, the court shall appoint counsel" (reprinted in Lindman and McIntyre, *The Mentally Disabled and the Law* (1961), at p. 402). *In Re Gault, supra,* ruled, in the context of a "civil" commitment proceeding, that an alleged juvenile delinquent was constitutionally entitled to assigned counsel. In *Heryford* v. *Parker, supra,* the Tenth Circuit followed *Gault* in ruling that a prospective mental patient was constitutionally entitled to assigned counsel.

In *Lynch* v. *Overholser, supra* at 711, this Court noted that "representation by counsel or by a guardian ad litem is necessary" in a civil commitment proceeding, citing *Dooling* v. *Overholser*, 243 F.2d 825 (D.C. Cir. 1957). The statutory provisions before the court in *Dooling* authorized but did not expressly require representation by counsel. In order "to avoid any question of their failure to meet the due process requirements," the court construed those provisions to provide that "the alleged insane person has the right to be represented by counsel, and if not so represented independently then the court shall appoint either

an attorney or a guardian ad litem" (243 F.2d at 827). See also, *Specht* v. *Patterson*, *supra*, where this Court held that a person charged with being "an habitual offender and mentally ill" had a due process right to "be present with counsel" at the commitment hearing (386 U.S. at 610).

Other courts, too, have recognized that indigent mental patients have a constitutional right to assigned counsel. E.g., *People ex rel. Woodall* v. *Bigelow*, 20 N.Y.2d 852, 285 N.Y.S.2d 85 (1967); and *People ex rel. Rogers* v. *Stanley*, 17 N.Y.2d 256, 270 N.Y.S.2d 573 (1966).

In the present case, Donaldson, like Gerald Gault, faced "the awesome prospect of incarceration in a state institution" (387 U.S. at 366-37). Although Donaldson was and is indigent, he was not provided legal representation in the initial commitment proceeding or in his subsequent efforts to obtain release.

B. *Involuntary Confinement Is Justified, if at All, Only if the Necessity for Confinement Is Proved Beyond a Reasonable Doubt.*

It is not entirely clear whether Donaldson was committed for his own "welfare" or because he was thought to be dangerous to others. In either event, it appears that the necessity for his confinement was judged under a "preponderance of the evidence" rather than a "reasonable doubt" standard.

In *Denton* v. *Commonwealth*, 383 S.W.2d 681, 683 (Ky. 1964), however, the court ruled, relying upon the due process clause, that "the burden of proof" in a civil proceeding for the commitment of an allegedly mentally ill person "should be the same as those in any criminal or quasi criminal proceeding."

Now pending before this Court is a case which challenges the constitutionality of the "preponderance" test in a juvenile delinquency proceeding. *In Re Winship*, No. 778, probable jurisdiction noted October 27, 1969, 38 U.S. L.W. 3153. If this Court should hold that an alleged delinquent can constitutionally be committed only upon proof "beyond a reasonable doubt," it would follow, *a fortiori*, that Donaldson's commitment was unconstitutional.[1] But even if this Court were to approve a "preponderance" test for delinquency proceedings, there would still remain cogent reasons for applying the stricter test in mental commitment proceedings. The prospective mental patient, unlike the prospective delinquent, is not charged with commission of any specific act or acts. He is charged either with being "mentally ill" or with being dangerous to himself or others, or both. We should be especially solicitous of liberty when it rests upon concepts so imprecise as "mental illness" or "dangerousness." Unlike tuberculosis or cancer, "mental illness" is not a "cause" of disorder; it is, at most a "theory" to explain unconventional conduct or belief. As such, its boundaries expand or contract according to the life styles and value judgments of the theorist. Some psychiatrists, for example, believe that all "hippies" are mentally ill; others disagree.[2]

[1] E.g., *Dexter v. Hall*, 82 U.S. 9 (1873), in which this Court noted that an alleged lunatic requires greater judicial protection than a minor.

[2] Szasz, *Law, Liberty and Psychiatry* (1963), pp. 11-17; Leifer, *In the Name of Mental Health* (1968).

[3] E.g., *In Re Scaly*, 218 So.2d 765 (D. Ct. App. Fla. 1969), in which two doctors testified that a self-proclaimed "hippie" who believed in free-love, non-violence and the use of hallucinogenic drugs was mentally ill. A psychologist disagreed. The Appellate Court set aside an order of commitment because "the fact that he decided to lead the kind of life, entertain beliefs and engage in

Similarly, we should be slow to condition human liberty upon a concept as vague as "dangerousness." Except as applied to mental patients, preventive detention is still an ugly phrase.[7] Our society is remarkably, though properly, reluctant to confine persons solely because of what they might do in the future. Probably fifty to eighty per cent of all ex-felons will commit future crimes,[8] but we do not confine them. Ghetto residents and teenage males are also much more likely to commit dangerous acts than the "average" member of the population,[9] but we do not

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conduct which was offensive, repulsive, and objectionable to others does not necessarily indicate mental incompetence, nor does it justify confining him to a mental institution . . ." (218 So.2d at 768).

[7] A somewhat more detailed discussion of this point will be found in Ennis, "Mental Illness," 1969-1970 Annual Survey of American Law 29, 45-48. See also, Dershowitz, "On Preventive Detention," New York Review of Books (March 13, 1969), p. 22 at p. 23: "The most widespread form of preventive detention employed in the United States today is commitment of the mentally ill."

[8] For example, the recidivism rate in New York City is 73%. In New York federal institutions the rate is 63%. In New York State institutions the rate is 52%. Khiss, "Albany Report Calls Jails 'Crime Breeding Grounds,'" *The New York Times*, November 10, 1969, p. 30.

[9] *E.g.*, Report of the National Advisory Commission on Civil Disorders (1968), pp. 128-135; *Youth in the Ghetto* (Harlem Youth Opportunities Unlimited, Inc., 1964), pp. 137-160: Juvenile delinquency rate for Central Harlem is two to three times higher than the New York City average; narcotics use in Central Harlem is ten times the city rate; and the homicide rate is six times the city rate. See also, Livermore, Malmquist & Meehl, "On the Justifications for Civil Commitment," 117 U. Pa. L. Rev. 75 (1968), pp. 76-77: "By combining background environmental data, we can identify categories of persons in which we can say that fifty to eighty per cent. will engage in criminal activity within a short period of time. If social protection is a sufficient justification for incarceration, this group should be confined as are those criminals who are likely to sin again."

confine them. Of all the identifiably dangerous groups in society, only the "mentally ill" are singled out for preventive detention,[10] and they are probably the least dangerous, as a group, of the groups here mentioned. Why should society confine a person if he is dangerous and mentally ill but not if he is dangerous and sane?[11] If a sane man is dangerous, then, by definition, his "rationality" and awareness of the consequences of apprehension do not deter his dangerous acts. It is not enough to say that the mentally ill and dangerous person might be treated and rendered non-dangerous. That argument assumes that the person is dangerous *because* he is mentally ill, and would not be so if sane. Courts have difficulty enough in deciding whether a *past* act, under known circumstances, was the "product" of a mental disease, or was, instead, the product of cultural, educational, economic, familial, or other factors.

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[10] Only recently have states begun to confine sexual psychopaths. Their confinement, too, raises substantial constitutional questions. E.g., *Cross* v. *Harris*, —— F.2d ——, 38 U.S. Law Week 2247 (D.C. Cir., October 2, 1969).

[11] *E.g.*, Livermore, Malmquist & Meehl, *supra* note 9, at pp. 76-77, 83, and 85. Dershowitz, "The Role of Law and the Prediction of Harmful Conduct," reprinted in Katz, Goldstein and Dershowitz, *Psychoanalysis, Psychiatry & Law* (1967), at p. 588: "If the function of involuntary hospitalization is the preventive detention of dangerous people, then why should it matter whether such people are, or are not, 'mentally ill.' If a 'mentally healthy' person is sufficiently dangerous, why should he not be confined?" Similarly, approximately 70% of all suicides are committed by persons who are not mentally ill. Clinard, *Sociology of Deviant Behavior* (1957), p. 425. See also, Durkheim, *Suicide* (Free Press, 1951), especially pp. 66-67. If prevention of suicide is a legitimate social goal, why should we not confine all potential suicides, whether sane or insane?

Psychiatrists have not been very helpful in that regard,[12] and it is naive to assume they can be more helpful in predicting whether an unspecified *future* act, under unknown circumstances, will be the "product" of a mental disease. Preventive detention of persons who are thought to be both dangerous and mentally ill may appear to be more reasonable than preventive detention of the "sane," but it is not.

What little evidence there is suggests that the mentally ill are probably less dangerous than the mentally healthy. For example, a five and a half year study of 5,000 patients discharged from New York State mental hospitals showed that "patients with no record of prior arrest have a strikingly low rate of arrest after release. . . . Their over-all rate of arrest is less than 1/12 that of the general population and the rate for each separate offense is also far lower, especially for more serious charges."[13] Another psychia-

[12] E.g., *Washington v. United States*, 390 F.2d 444 (D.C. Cir. 1967), in which the court ruled that psychiatrists should not be permitted to give an opinion on whether a criminal act was the "product" or "result" of mental illness.

[13] Brill and Malzberg, "Statistical Report Based on the Arrest Record of 5354 Male Ex-Patients Released from New York State Mental Hospitals During the Period 1946-1948" (unpublished report). See also, *The Clinical Evaluation of the Dangerousness of the Mentally Ill* (Jonas R. Rappaport, M.D., ed., 1967); Pollock, "Is the Paroled Patient a Menace to the Community?" Psychiat. Q., V. 12 (1938); Rappaport, Lassen & Gruenwald, "Evaluation and Follow-up of State Hospital Patients Who Had Sanity Hearings," 118 Am. J. Psychiat. 1079 (June 1962); Giovanni and Gurel, "Socially Disruptive Behavior of Ex-Mental Patients," 67 Archives Gen. Psychiat. 146-153 (1967). Similarly, the frequency of automobile accidents and driving violations by ex-mental patients does not vary significantly from the frequency rate for a large comparison group. Buttliglieri: "Temporal Relationship Between Automobile Accidents and Psychiatric Hospitalization," Perceptual and Motor Skills, V. 24 (1967), pp. 1327-1332.

trist states that there is "not a shred of evidence that the mentally ill are any more dangerous than the mentally healthy."[14] A diagnosis of mental illness tells us nothing about whether the person so diagnosed is or is not dangerous. Some mental patients are dangerous, some are not. Perhaps the psychiatrist is an expert at deciding whether a person is mentally ill, but is he an expert at predicting which of the persons so diagnosed are dangerous? Sane people, too, are dangerous, and it may legitimately be inquired whether there is anything in the education, training or experience of psychiatrists which renders them particularly adept at predicting dangerous behavior. Predictions of dangerous behavior, no matter who makes them, are incredibly inaccurate,[15] and there is a growing consensus that psychiatrists are not uniquely qualified to predict dangerous behavior and are, in fact, less accurate in their predictions than other professionals.[16]

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[14] Szasz, Hearings before the Subcommittee on Constitutional Rights of the Committee of the Judiciary, United States Senate, 87th Cong., 1st Sess.; Part I—Civil Aspects, March 28, 29 and 30, 1961, at p. 271.

[15] The best study of this problem, which cites and discusses numerous other studies, is Livermore, Malmquist & Meehl, "On the Justifications for Civil Commitment," 117 U. Pa. L. Rev. 75 (1968), see especially pp. 82-86. See also, Foote, "The Coming Crisis in Bail," 113 U. Pa. L. Rev. 1125 (1965), and Rosen, "Detection of Suicidal Patients: An Example of Some Limitations in the Prediction of Infrequent Events," 18 J. Consul. Psychol. 397, 402 (1954).

[16] *E.g.*, Dershowitz, "The Psychiatrist's Power in Civil Commitment: A Knife that Cuts Both Ways," Psychology Today (Feb., 1969), p. 43 at p. 47: "Surprisingly enough, we were able to discover fewer than a dozen studies which followed up psychiatric predictions of anti-social conduct. And even more surprisingly, these few studies strongly suggest that psychiatrists are rather inaccurate predictors—inaccurate in an absolute sense—and even less accurate when compared with other professionals, such as psychologists, social workers and correctional officials; and when com-

Because predictions of dangerous behavior are so grossly unreliable, and because "mental illness" is, at best, an illusive concept,[17] we should authorize involuntary confinement only if the necessity for confinement is proved "beyond a reasonable doubt." That is the standard urged by one of this country's most respected jurists.[18]

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pared to actuarial devices such as prediction or experience tables. Even more significant for legal purposes, it seems that psychiatrists are particularly prone to one type of error—overprediction. They tend to predict anti-social conduct in many instances where it would not, in fact, occur. Indeed, our research suggests that for every correct psychiatric prediction of violence, there are numerous erroneous predictions. That is, among every group of inmates presently confined on the basis of psychiatric predictions of violence, there are only a few who would, and many more who would not, actually engage in such conduct if released." And see, in a different context, Halleck, "The Psychiatrist and the Legal Process," Psychology Today (Feb., 1969), p. 25, in which the author states that "assignment of responsibility [*i.e.*, was the criminal act the product of mental disease—should the criminal be found guilty?] primarily involves philosophical considerations. In this area every citizen has an opinion and it is unlikely that the psychiatrist's training or experience makes him more of an expert." See also, Morris, "Psychiatry and the Dangerous Criminal," 41 S. Cal. L. Rev. 514, 532-36 (1968).

[17] In 1950, Justice Frankfurter noted "the present state of the tentative and dubious knowledge as to mental diseases and the great strife in schools in regard to them . . ." and expressed concern over the "treacherous uncertainties in the present state of psychiatric knowledge." *Solesbee* v. *Balkom*, 339 U.S. 9, 24-25 (1950) (dissenting opinion). What Justice Frankfurter said then remains true today. E.g., *Powell* v. *Texas*, 392 U.S. 514, 526, 559-560 (1968). *Mental Illness & Due Process* (Association of the Bar of the City of New York, 1962), pp. 17-18; Szasz, *Law, Liberty and Psychiatry* (1963), p. 137; Leifer, *In the Name of Mental Health* (1968).

[18] Chief Judge David L. Bazelon, "Implementing the Right to Treatment," 36 U. Chi. L. Rev. 742, 748-749 (1969).

II.

Civil mental patients are constitutionally entitled to periodic judicial review of their mental condition.

The assumption underlying civil commitment is that mental illness can be cured. The corollary to this assumption is that mental patients have a right to periodic review of their mental condition, to determine if they have recovered. It is inconceivable that respondents would dispute Donaldson's right to periodic review by *someone*. Surely respondents would concede, at the least, that the hospital authorities where Donaldson is confined are under an obligation periodically to review his mental condition. The question here is whether Donaldson has a right to periodic *judicial* review. He has been denied judicial scrutiny of his mental condition for almost fourteen years. Each time he requests a judicial hearing, the court defers to the opinion of the very psychiatrists whose judgment Donaldson contests. Basic to our jurisprudence, however, is the belief that those who urge the necessity of deprivation of liberty should not judge the validity of their own opinion. In a closely analogous situation, lower courts have ruled that any court which finds a defendant incompetent to stand trial "has a duty to inquire from time to time into the mental status of persons committed by it." *Arco* v. *Ciccone*, 252 F. Supp. 347, 349 (W.D. Mo. 1965), *aff'd*, 359 F.2d 796 (8th Cir. 1966). See also, to the same effect, *Tyler* v. *Harris*, 226 F. Supp. 852, 854 (W.D. Mo. 1964); *Birnbaum* v. *Harris*, 222 F. Supp. 919, 920 (W.D. Mo. 1963); *Hogan* v. *Settle*, 202 F. Supp. 804, 805 (W.D. Mo. 1962); *Crescioni* v. *Settle*, 202 F. Supp. 868 (W.D. Mo. 1962); *Johnson* v. *Settle*, 184 F. Supp. 103, 106 (W.D. Mo. 1960); *United States* v. *Morris*, 154 F. Supp. 695,

697 (S.D. Calif. 1957); and *Higgins* v. *McGrath*, 98 F. Supp. 670, 674-675 (W.D. Mo. 1951). Similarly, the Association of the Bar of the City of New York has recommended that allegedly mentally ill convicts should receive periodic judicial review. *Mental Illness, Due Process and the Criminal Defendant* (1968), pp. 22-26. Even more closely in point is the decision in *Nelson* v. *Sandritter*, 351 F.2d 284, 285 (9th Cir. 1965), which involved a patient in a state mental hospital:

> Unquestionably, such a patient is entitled to periodic judicial reconsideration of the causes for his involuntary confinement. Progress in the mental health sciences and in the treatment of the mentally ill will alone justify such reconsideration. How frequently a patient is entitled to judicial review of the causes of his confinement must depend upon the circumstances of each case.

With respect to Donaldson's *initial* commitment, respondents would concede that anything longer than a "temporary" or "emergency" commitment would be unconstitutional, even though based on medical opinion, unless Donaldson were afforded the opportunity of a judicial hearing. The same reasons which require an opportunity for a judicial hearing at the initial commitment are equally applicable at periodic intervals.

This point is discussed in Lindman and McIntyre, *The Mentally Disabled and the Law* (1961), pp. 150-151. As Lindman and McIntyre there note, Section 18 of the Draft Act Governing Hospitalization of the Mentally Ill, prepared by the National Institute of Mental Health, specifically provides for periodic judicial review of the civil patient's men-

tal condition (the Act is reprinted in Lindman and McIntyre at pp. 397-416). New York, too, requires periodic judicial review (New York Mental Hygiene Law, section 73). Petitioner believes that Florida cannot, consistent with the Constitution, do less.

III.

Civil mental patients are constitutionally entitled to adequate psychiatric treatment.

No court has yet held that mental patients have a constitutional right to adequate psychiatric treatment, but several courts have indicated they would so hold if relief could not otherwise be obtained.[19] Secondary authorities

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[19] E.g., *Rouse* v. *Cameron*, 373 F.2d 451 (D.C. Cir. 1966) (relying on both substantive and procedural due process, equal protection, and cruel and unusual punishment clauses); *Sas* v. *Maryland*, 334 F.2d 506 (4th Cir. 1964) (relying on equal protection clause); *Nason* v. *Superintendent of Bridgewater State Hospital*, 353 Mass. 604, 233 N.E.2d 908 (1968) (relying on equal protection clause and substantive due process); *United States ex rel. Schuster* v. *Herold*, 410 F.2d 1071 (2d Cir.), *cert. denied* 24 L. Ed.2d 96 (1969). See also, *United States* v. *Jackson*, 306 F. Supp. 4 (N.D. Calif. 1969); *Daynell* v. *Cameron*, 348 F.2d 64 (D.C. Cir. 1965); *Millard* v. *Cameron*, 373 F.2d 468 (D.C. Cir. 1966); *Miller* v. *Overholser*, 206 F.2d 415 (D.C. Cir. 1953); *People ex rel. Meltsner* v. *Warden of Green Haven Prison*, 32 A.D.2d 389, 302 N.Y.S.2d 624 (2d Dept. 1969); *People ex rel. Berdaguer* v. *Morrow*, 60 Misc.2d 189, 302 N.Y.S.2d 628 (Sup. Ct. Sullivan Co. 1969); *Whitree* v. *State of New York*, 56 Misc.2d 693, 290 N.Y.S.2d 486 (Ct. Cl. 1968); *People* v. *Fuller*, 24 N.Y.S.2d 292, 300 N.Y.S.2d 102, 248 N.E.2d 17 (1969) (narcotics addict); *People ex rel. Blunt* v. *Narcotic Addiction Control Commission*, 58 Misc.2d 57, 295 N.Y.S.2d 276 (Sup. Ct. Bronx Co. 1968), *aff'd*, 24 N.Y.2d 850, 301 N.Y.S.2d 89, 248 N.E.2d 918 (1969) (narcotics addict); *People ex rel. Kaganovitch* v. *Wilkins*, 23 A.D.2d 178, 259 N.Y.S.2d 462 (1965) (sex offender); *People* v. *Bailey*, 21 N.Y.2d 588, 237 N.E.2d 205, 289 N.Y.S.2d 943 (1968); *People ex rel. Cescini* v. *Warden*, 30 A.D.2d 649, 291 N.Y.S.2d 200 (1968); *People* v. *Mosher*, 24 A.D.2d 47, 263 N.Y.S.2d 765 (1965); *People* v. *Jackson*, 20 A.D.2d 170, 245 N.Y.S.2d 534 (1963).

are virtually unanimous that there is a constitutional right to treatment.[20]

This Court, too, has at least implicitly recognized the constitutional infirmities inherent in "civil" confinement without treatment. In *Powell* v. *Texas*, 392 U.S. 514 (1968), for example, this Court rejected the suggestion that chronic alcoholics should be dealt with only under civil auspices, because civil "facilities for the attempted treatment of indigent alcoholics are woefully lacking throughout the country" (392 U.S. at 528). Of course, "criminal" facilities for treating alcoholics are also grossly inadequate, but, as the Court noted, "one virtue of the criminal process is, at least, that the duration of penal incarceration typically has some outside statutory limit . . . 'Therapeutic civil commitment' lacks this feature; one is typically committed until one is 'cured.' Thus, to do otherwise than affirm might subject indigent alcoholics to the risk that they may be locked up for an indefinite period of time under the same conditions as before, with no more hope than before of receiving effective treatment and no prospect of periodic 'freedom'" (392 U.S. at 529).

The decision in *Powell* rested upon this Court's willingness to recognize the "unpleasant reality" that treatment facilities for alcoholics are woefully inadequate (392 U.S. at 530). Petitioner asks no more. He asks only that this

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[20] For a comprehensive and recent analysis of this burgeoning area of the law, see "A Symposium: The Right to Treatment," 57 Georgetown L.J. 673 (1969). See also, Bazelon, "Implementing the Right to Treatment," 36 U. Chi. L. Rev. 742 (1969); Katz, "The Right to Treatment—An Enchanting Legal Fiction?" 36 U. Chi. L. Rev. 755 (1969); Morris, "Criminality and the Right to Treatment," 36 U. Chi. L. Rev. 784 (1969); Comment, "The Nascent Right to Treatment," 53 Va. L. Rev. 1134 (1967); Birnbaum, "The Right to Treatment," 46 A.B.A.J. 499 (1960).

Court recognize that there are in this country thousands of citizens confined to institutions labeled "hospitals" but which are, in reality, jails.

> Much of the care received today in our gigantic state mental institutions is merely custodial. Most of these institutions are woefully overcrowded and include within their walls many senile patients and others who could be more effectively cared for elsewhere if society wanted to provide for them. Complicating the situation still further is a severe and continuing manpower shortage, which includes both psychiatrists and other personnel such as psychologists, nurses, social workers, and attendants. Our state mental hospitals have not attracted a sufficient number of trained psychiatrists, who often feel greater professional satisfaction and earn higher incomes in private practice.[21]

Powell is not the only relevant decision. *Robinson* v. *California*, 370 U.S. 660 (1962), for example, suggests that civil confinement without treatment would be cruel and unusual punishment for the mere "status" of being mentally ill. There is no doubt that petitioner is confined because of his status, rather than because of his behavior. There is absolutely no indication either before or during his thirteen year confinement that Donaldson has ever threatened or committed any act that could be considered dangerous to himself or others. And it is clear that, absent such acts, confinement because of a prediction of possibly dangerous future conduct would be unconstitutional. *Min-*

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[21] Comment, "Civil Restraint, Mental Illness, and the Right to Treatment," 77 Yale L.J. 87, 88 (1967), and the authorities cited therein.

nesota ex rel. Pearson v. *Probate Court*, 309 U.S. 270, 274 (1940). See also, *Powell* v. *Texas*, 392 U.S. 514, 533, 543 (1968); *Robinson* v. *California*, 370 U.S. 660, 678-679 (1962) (Harlan, *J.*, concurring); and *Lynch* v. *Overholser*, 369 U.S. 705, 714 (1962).

Assuming for the moment that there is a constitutional right to adequate treatment, Donaldson's petition could be resolved in one of several ways. This Court could find that the gross disparity between the physician-patient ratio in Florida State Hospital (1 to 950) is so far below the *minimum* standard established by the American Psychiatric Association (1 to 150), that Donaldson's confinement is, on its face, unconstitutional. Similarly, this Court could find, on the basis of those ratios, that Donaldson's petition raises a substantial question as to the adequacy of his treatment which entitles him to an administrative or judicial hearing, or both, and that if such hearing is not held in the immediate future, he will be entitled to release. Finally, this Court could recognize that some persons are not treatable and that if they have not been "cured" and released within a year or two, they are more likely to leave in a coffin than on their own two feet.[22] It would then be the duty of the persons recommending Donaldson's continued confinement to show not only that he is receiving adequate

[22] W. Bloomberg, "A Proposal for a Community-based Hospital as a Branch of a State Hospital," 116 Am. J. Psychiatry 814-817 (1960): "There is repetitive evidence that once a patient has remained in a large mental hospital for two years or more, he is not likely to leave except by death." See also, Penn, Sindberg & Roberts, "The Dilemma of Involuntary Commitment," 53 Mental Hygiene 5 (Jan. 1969); Dunham & Weinberg, *The Culture of the State Mental Hospital* 244 (1960); S. Frazier and A. Carr, *Introduction to Psychopathology* 129 (1964).

treatment, but also that he is treatable.[23] Placing an absolute or presumptive time limit on confinement would do much to ensure adequate treatment. The concept of a deadline is necessary in the law, in education, and in business. It is equally necessary in psychiatry.

CONCLUSION

For the reasons stated above, certiorari should be granted to review the important federal questions presented in this case.

Respectfully submitted,

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[23] E.g., *United States ex rel. Schuster* v. *Herold*, 410 F.2d 1071 (2d Cir. 1969), *cert. denied*, 24 L. ed.2d 96 (1969). The hospital admitted that Schuster's illness "would not respond to therapy" (410 F.2d at 1076), and the court therefore questioned the propriety of "purely custodial detention" (410 F.2d at 1088, 1087). priety of "purely custodial detention" (410 F.2d at 1088).